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IN THE

Supreme Court of the United States

October Term, 1963

No. 130

GEORGE ANTHONY ROSSETTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

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Dated: November 4, 1963

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PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its Order of October 14, 1963, denying the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit, in the above entitled case.

The Facts

Petitioner was convicted of aiding and abetting one Kasamis to smuggle narcotics into the United States, in violation of 21 U.S.C. § 176a, and was sentenced to a prison term of 7 years. The Court of Appeals, while affirming the conviction, expressly recognized in its opinion below that a

"close case is presented". (315 F. 2d 86). It consisted entirely of circumstantial evidence, the items of proof, which we here summarize for the convenience of the Court, being as follows:

Kasamis, who had been separately tried and convicted prior to petitioner's trial, was apprehended on February 22, 1962 at 10:30 A.M. as he entered into California from Mexico. He was driving a green and black 1952 Oldsmobile in which 35 lbs. of narcotics were concealed. About two months before, petitioner had placed the green and black Oldsmobile (registered in the name of one Crea, a co-defendant who was tried with petitioner and acquitted) for sale in a lot in Lancaster, California. Petitioner had been seen together with Kasamis on occasion and on February 20, 1962 had been seen driving off together with Kasamis from the latter's home. During the night of February 21, 1962, petitioner registered at a motel in San Ysidro, California, near the port of entry.

Two other items of evidence of great significance at petitioner's trial bear mention. They are integrally related to the grounds for rehearing advanced below. (1) Kasamis, after invoking the Fifth Amendment, testified at petitioner's trial, over the objection of counsel, that he had received the keys for the green and black Oldsmobile on the morning he was apprehended—the inference from the invocation of the Fifth Amendment being that petitioner had given him the keys; and (2) there was evidence that petitioner and his family moved from their residence in the Lancaster, California area (approximately 200 miles from the port of entry) on the afternoon of February 22, allegedly removing

their daughter from school without giving prior notice to the principal.*

Reasons for Granting Rehearing and Issuing the Writ

On this petition for rehearing, we respectfully urge that denial of certiorari be reconsidered in the light of two recent decisions by this Court, which were evidently unavailable to prior counsel for petitioner at the time the application for certiorari was originally made. (Petitioner's present counsel was retained subsequent to the denial of the petition). The decisions to which we advert are *Wong Sun* v. *United States*, 371 U.S. 471 (1963), relating to the issue of flight, and *Namet* v. *United States*, 373 U.S. 179 (1963), bearing upon the testimony of Kasamis which had been introduced with knowledge by the prosecutor that the Fifth Amendment would be invoked. These decisions throw into severe question the two principal bases for petitioner's conviction. Indeed, in our view, these decisions not only render petitioner's conviction improper, but also, as we shall demonstrate, engender far broader questions, which require resolution by this Court, relating to the general administration of Federal criminal justice.

(A)

In the *Wong Sun* case, *supra*, one of the issues presented was the existence of probable cause for the arrest of one

* It was shown upon a motion for a new trial that about a week before February 22, the daughter's teacher had been notified that the family would be moving. Petitioner was arrested in Brooklyn, New York, on March 13, 1963. He was openly residing in the same building as his mother and brother and concededly had not made any effort to conceal his identity (Tr. 178, 182).

Toy. The evidence showed that when Toy was confronted at the door of his laundry shop by Federal narcotic agents, he immediately slammed the door and ran down the hall (371 U.S. at p. 474). The Government urged that Toy's flight provided sufficient basis for probable cause (Id. at p. 482). The Court, expressly rejecting this contention, held that "Toy's refusal to admit the officers and his flight down the hallway thus signified a guilty knowledge no more clearly than it did a natural desire to repel an apparently unauthorized intrusion" (Id. at p. 483).

In a footnote to this holding, Mr. Justice Brennan, writing for the Court, equated the situation there presented with the use of evidence of flight as corroborative proof of guilt, noting that the "two questions are inescapably related"; and proceeded to deplore the use of such evidence (Id. at p. 483 n. 10). Thus, the Court stated:

> "It is relevant to the present case that we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime. In Alberty v. United States, 162 U.S. 499, 511, this Court said:
>
> "* * * it is not universally true that a man who is conscious that he has done a wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper,' since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'" (Ibid.)

It is of especial relevance to this case, that the Court in amplification of its position in *Wong Sun* quoted with approval from the cases of *Vick* v. *United States*, 216 F. 2d 228, 233 (5th Cir. 1954) and *Cooper* v. *United States*, 218 F. 2d 39, 41 (D.C. Cir. 1954). In the *Vick* case defendant was convicted of operating an illegal still. The principal evidence against him was that he was found by Federal agents in the woods near the still, and that he attempted to flee from the arresting officers. The Court of Appeals there held that "One motive is about as likely as another. Appellant may be guilty but his conviction cannot rest upon mere conjecture and suspicion" (216 F. 2d at p. 233). In the *Cooper* case defendant was convicted of robbery. The sole evidence against him, which is strikingly similar to the present case, was that he had purchased the get-a-way car, was a friend of one of the robbers, and that he had asked a cousin of his to say that she was with him in another State on the day of the robbery. The Court of Appeals, in reversing the conviction, noted that "After all, innocent people caught in a web of circumstances frequently become terror-stricken" (218 F. 2d at p. 41).

We believe that the tenuousness of the circumstances implicating petitioner in this case far exceeded those presented in *Vick* and *Cooper* where the convictions were reversed. Over one-half of the Government's proof against petitioner in this case consisted of evidence as to the alleged flight of petitioner and his family from their home (over 200 miles from the port of entry) on the day that Kasamis was arrested—even though there was not a shred of evidence that petitioner saw or communicated with Kasamis on that day, or that he was other than a mere friend, or for that matter, that petitioner knew or had reason to know

that Kasamis had been arrested. The jury was permitted to consider this evidence as to flight over the objection of counsel. It no doubt weighed heavily in their minds and tipped the scales in this admittedly "close case" against the petitioner.

Indeed, we submit, this was recognized by the Court below. The Court of Appeals in its opinion recounted the evidence as to alleged flight and found "no error" in its admission, the failure of the trial court to strike the evidence, or its permitting the jury to consider it. The Court of Appeals wrote (315 F. 2d at p. 86):

> "Flight does not create a presumption of guilt (*McFarland* v. *United States*, 5 Cir. 1960, 273 F. 2d 417), but: 'It is today universally conceded that the fact of an accused's flight . . . is . . . admissible as evidence of consciousness of guilt, and thus of guilt itself.' *Green* v. *United States*, D.C. Cir. 1958, 259, F. 2d 180, quoting 2 Wigmore, Evidence, §276 (3d ed.)."

We urge that the holding below is directly contrary to the rule announced by this Court in *Wong Sun* and the *Vick* and *Cooper* cases approved therein. Review is therefore indicated to correct this variant approach to the role of alleged flight in a Federal criminal prosecution. In the event it was not the intention of this Court to promulgate any rules in *Wong Sun* as to the admission of proof as to flight, we respectfully urge that the position of this Court requires clarification. The formulation of precise rules for the guidance of the lower Federal Courts on this issue is appropriate; and consistency in the administration of Federal criminal justice would be promoted thereby.

(B)

In assessing the crucial factors which influenced the conviction of petitioner in this case, we submit that the testimony of the smuggler, Kasamis, and the inferences drawn from his invocation of the Fifth Amendment, stand on equal footing with the evidence as to flight. The Government with prior knowledge that Kasamis would invoke the privilege against self-incrimination (and after indicating that immunity should be obtained to preclude any prejudice—but it was not) called him as a witness. After refusing to testify on the grounds of self-incrimination and being directed by the Court to do so, Kasamis testified that he received the keys to the green and black Oldsmobile on February 22, 1962. It was independently disclosed to the jury that the green and black Oldsmobile which Kasamis drove when apprehended had previously been put up for sale by petitioner; and that petitioner happened to be near the port of entry on the night of February 21. Under these circumstances, the obvious and irresistible inferences drawn by the jury from the testimony of Kasamis as to the keys, following upon his initial refusal to answer, was that he refused to answer because he was protecting a friend, namely, the petitioner who had given him the keys. Such inferences were of a most prejudicial nature. The prejudice was heightened by the stress given this testimony by the prosecution during summation. It was urged at least 5 times that petitioner was the one who gave Kasamis the keys to the Oldsmobile on the morning of February 22.

The situation thus presented in this case is precisely one recognized by this Court in its recent decision in the *Namet* case, supra, as calling for reversal of a criminal conviction.

In *Namet*, the petitioner was convicted of violating the Federal wagering tax law. Two witnesses were called by the prosecutor with knowledge that they would invoke the privilege against self-incrimination. Mr. Justice Stewart writing for the majority of the Court reviewed the prior decisional law on the subject and recognized the rule that the calling of a witness with knowledge that the privilege would be invoked is error for the reason of (1) prosecutorial misconduct, or (2) that "inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination and thus unfairly prejudiced the defendant" (373 U.S. at p. 187). It was noted, however, that notwithstanding the presence of one of these elements in a given case, reversal may be avoided where (1) "such episodes were 'no more than minor lapses through a long trial.' *United States* v. *Hiss*, 185 F. 2d 822, 832 (C.A. 2nd Cir.)" (Ibid.); or (2) cautionary instructions to the jury to disregard the episodes were given. (Ibid.; see e.g. *U.S.* v. *Gerhie*, 252 F. 2d 664 [2nd Cir., 1958]; *Weinbaum* v. *U.S.*, 184 F. 2d 330 [9th Cir. 1950]; *U.S.* v. *Cioffi*, 242 F. 2d 473 [2nd Cir., 1957]; *U.S.* v. *Romero*, 249 F. 2d 371 [2nd Cir., 1957]; see also *U.S.* v. *Maloney*, 262 F. 2d 535, 538 [2nd Cir., 1959]).

In *Namet*, the episodes presented at trial were viewed by the Court as "no more than minor lapses" in accordance with the *Hiss* case, supra; and, hence, not reversible error. Thus, Mr. Justice Stewart wrote:

> "We cannot find that these few lapses, when viewed in the context of the entire trial, amounted to planned or deliberate attempts by the Government to make capital out of witnesses' refusals to testify" (373 U.S. at p. 189).

Defense counsel moreover, had "failed to object on behalf of the defendant" (Ibid). Counsel there represented not only the petitioner but also the two witnesses who had invoked the privilege (Id. at p. 180). The objections which he did take were on the ground of the *witness'* privilege and not the petitioner's right to a fair trial, free of prejudicial inference (see, e.g., Id. at pp. 181, 184). In "many instances", counsel, in fact, "actually acquiesced" (Id. at p. 189). Mr. Justice Stewart further wrote:

> "Nor can we find that the few invocations of privilege by the Kahns were of such significance in the trial that they constituted reversible error even in the absence of prosecutorial misconduct. The effect of these questions was minimized by the lengthy nonprivileged testimony which the Kahns gave * * * Thus, the present case is not one, like *Maloney*, in which a witness' refusal to testify is the only source, or even the chief source, of the inference that the witness engaged in criminal activity with the defendant. In this case the few claims of testimonial privilege were at most cumulative support for an inference already well established by the nonprivileged portion of the witness' testimony" (Ibid.).

In contrast to *Namet*, the saving circumstances which obviated error there are entirely absent in the case of bar. The situation presented, in fact, falls squarely within the orbit of prejudicial error there defined. Cast upon the scant background of the other evidence adduced against petitioner in this case, the inferences from the refusal of the witness to testify as to the keys to the car, constituted one of the principal, if not "the chief source" for inferring criminal involvement on petitioner's part (see also, *U.S. v. Cardillo*, 316 F. 2d 606, 611-13 [2nd Cir., 1963]). In this

particular case, then, the episode, can hardly be viewed as a "minor lapse" in a long trial; nor can it be said that its effect was "minimized by the lengthy nonprivileged testimony" of the witness. Objection, moreover, was duly taken on behalf of petitioner—in his interest and not on behalf of the witness, as in *Namet*.

Significantly, no cautionary instruction was given in this case, which might have arguably saved the day for a fair trial for petitioner. This we submit was the very minimum to which he was entitled. While such an instruction was not expressly requested by counsel for petitioner, the need for some instruction on the subject was called to the Court's attention (Tr. 236, 239). Under the decision in the *Maloney* case, supra (262 F. 2d 535), however, the failure to give a cautionary instruction is deemed "plain error" and a request, in consequence, is unnecessary. This very question was expressly left open by this Court in the *Namet* case. Thus, it was noted (373 U.S. at p. 190, n. 10):

> "Finding, as we do, that this case involves neither misconduct by the prosecution nor inferences of material importance, we need not pass upon the holding in *United States* v. *Maloney*, *supra*, that a failure to give proper curative instructions when such elements are present constitutes plain error."

This case we believe presents an appropriate occasion for resolution of this question. The requisite prejudice prescribed in *Namet* has been shown; and in its present posture the decision by the Ninth Circuit below stands contrary to the decisions of the other Circuit Courts who have previously passed on the question. They have unanimously held as this Court recognized in *Namet* that where the episode

is not a "minor lapse in a long trial", but is rather related to one of the crucial or "chief" sources for inferring guilt, as here, the cautionary instructions must be given (See cases cited at p. 8, *supra*).

The problem presented in this case is an oft-recurring one. We believe that a rule of procedure can be formulated by this Court whereby the possibility of prejudice may be effectively obviated in cases where the prosecution knows that a prospective witness will invoke the Fifth Amendment. We submit that when such a circumstance is known to a prosecutor, the trial court should be required to hold a preliminary hearing outside the presence of the jury and pass upon the propriety of the claim of privilege. If in its view the claim is warranted, the prosecutor should be enjoined from calling the witness. If it is unwarranted, the prospective witness should be instructed that he must answer the questions when posited in Court, and that he may not invoke the privilege, under penalty of contempt. Grant of the petition in this case will thus also afford this Court the opportunity to consider and promulgate such a necessary rule for the guidance of the lower Federal Courts.

CONCLUSION

The errors by the Courts below to which we have directed this Court's attention in the light of the recent decisions in *Wong Sun* and *Namet*, loom large in the posture of this case. Concededly, as the Court of Appeals noted below, a "close case" was here "presented". In this setting, as this Court held in *Glasser* v. *United States*, 315 U.S. 60, 67 (1942), even the slightest error is sufficient to tip the delicately poised

scales of justice. As a result of the evidence as to flight and the inferences from the invocation of the Fifth Amendment by Kasamis, petitioner was deprived of a fair trial.

Wherefore, petitioner respectfully prays that rehearing be granted, and upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: November 4, 1963

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

JEROME LEWIS
Attorney for Petitioner

Dated: November 4, 1963